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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
AND LOZANO ENTERPRISES,
Appellants,
VS.
THE CITY OF LOS ANGELES,
Appellee.

ON APPEAL FROM THE CALIFORNIA
COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO

MOTION OF APPELLEE CITY OF LOS ANGELES TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
MOTION OF APPELLEE CITY OF LOS ANGELES TO DISMISS OR AFFIRM	1
INTRODUCTION	2
ARGUMENT	7
1. The Judgment Below Was Correct In Holding That The Los Angeles City Business Tax Is Constitutional Under The Guidelines Enunciated By This Court In Minneapolis Star	7
2. Review Is Not Necessary To Secure Uniformity Of Decision	10
3. The Court Of Appeal Was Correct In Rejecting Appellants' Contention That The City Business Tax Is Unconstitutional Because It Grants The City Clerk "Standardless Discretion" To Adopt Rules To Apportion Taxes	13
CONCLUSION	16

Index to Appendices

APPENDIX A — Declaration of Donald J. DeBord, Dated January 29, 1986	A-1
APPENDIX B — Declaration of Donald J. DeBord, Dated November 22, 1985	B-1
APPENDIX C — City Clerk's Ruling No. 13 (New Series), Dated June 30, 1972	C-1
APPENDIX D — City Clerk's Ruling No. 14 (New Series), Dated June 30, 1972	D-1

TABLE OF AUTHORITIES

Cases

Page

Advisory Opinion To The Governor, In Re, 509 So.2d 292 (Fla. 1987) 12

Arizona Publishing Co. v. O'Neil (1938) 22 F.Supp. 117, judgment affirmed, 304 U.S. 543 (1938) 13

Arkansas Writers' Project, Inc. v. Ragland, No. 85-1370 (April 22, 1987) 95 L.Ed.2d 209.....10, 11

Big Mama Rag v. United States, 631 F.2d 1030 (D.C. Cir. 1980).....14, 15

Butler Brothers v. McColgan (1941) 315 U.S. 501... 14

Carmichael v. Southern Coal & Coke Co. (1936) 301 U.S. 495 9

City of Alameda v. Premier Communications Network, Inc., 156 Cal.App.3d 148, 202 Cal.Rptr. 684, cert. denied, 469 U.S. 1073 (1984) 12

Festival Enterprises, Inc. v. Pleasant Hill (1986) 182 Cal.App.3d 960, 227 Cal.Rptr. 601..... 12

Girage v. Moore (1937) 64 P.2d 819, appeal dismissed for want of a substantial federal question, 301 U.S. 670 (1937) 13

Louisiana Life, Ltd. v. McNamara, 504 So.2d 900 (La.App. 1 Cir., 1987) 11

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue (1983) 460 U.S. 575 ....1, 7, 8, 9, 10

National Alliance v. United States, 710 F.2d 868 (D.C. Cir., 1983) 14

Regan v. Taxation With Representation (1983) 461 U.S. 540 15

Tampa Times Co. v. City of Tampa (1947) 29 So.2d 368, appeal dismissed for want of a substantial federal question, 332 U.S. 749 (1947) 13

Thomson Newspapers, Inc. v. City of Florence, 338 S.E.2d 324 (S.C. 1985) 12

Table of Authorities

Constitution

Page

United States Constitution, First Amendment 7, 8, 9, 10, 12, 15

Rule

Rules of the Supreme Court of the United States, Rule 16.1 1

Statutes

Los Angeles Municipal Code, Sec. 21.15(h) 3, 6
Los Angeles Municipal Code, Sec. 21.109 ..... 3, 5, 6
Los Angeles Municipal Code, Sec. 21.109(d) 5
Los Angeles Municipal Code, Sec. 21.147 ..... 3, 5
Los Angeles Municipal Code, Sec. 21.166 ..... 3, 5, 6
Los Angeles Municipal Code, Sec. 21.166(f) 5
Los Angeles Municipal Code, Sec. 21.167 ..... 3, 5, 6
Los Angeles Municipal Code, Sec. 21.167(d) 5
Los Angeles Municipal Code, Sec. 21.189.2 ..... 3, 5, 6
Los Angeles Municipal Code, Sec. 21.190 ..... 3, 4
Los Angeles Municipal Code, Sec. 21.190(c)(7) ... 5
Los Angeles Municipal Code, Sec. 21.190(c)(8) ... 5
Los Angeles Municipal Code, Sec. 21.192 ..... 3, 4

City Clerk's Tax Rulings

Ruling 13 ..... 6, 15
Ruling 14 ..... 6, 15

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THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
AND LOZANO ENTERPRISES,
Appellants,
VS.
THE CITY OF LOS ANGELES,
Appellee.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

MOTION OF APPELLEE CITY OF LOS ANGELES TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the Appellee, City of Los Angeles, a municipal corporation, moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal, Second Appellate District, Division Two. The motion is based on the fact that the judgment below is correct and not in conflict with this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* [(1983) 460 U.S. 575], nor any decision of a federal or state court. Further, the apportionment formulae of the City of Los Angeles meet all constitutional standards with respect to apportionment of business taxes and there are no inconsistent

or conflicting decisions requiring review by this Court. Based on these grounds it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

INTRODUCTION

The City of Los Angeles (City) is a municipal corporation organized and existing by virture of a charter as authorized by the Constitution of the State of California. The City has a Business Tax Ordinance ("ordinance") which is codified as Article 1 of Chapter II of the Los Angeles Municipal Code and imposes a tax on persons for the privilege of engaging in business or occupations within the City (DeBord Declaration ¶¶ 4 & 5,[1] Appendix A, p. 1). The tax is a self reporting tax and is imposed pursuant to the taxing power of the City solely for the purpose of raising revenue (DeBord Declaration ¶¶ 5 & 6, Appendix A, pp. 1-2).

Every person engaged in business or an occupation within the City must obtain a Business Tax Registration Certificate which is the means whereby a taxpayer registers with the City Clerk for the purpose of paying business taxes and results in an account number being given to the taxpayer (DeBord Declaration ¶ 5, Appendix A, p. 1). The Office of the City Clerk does not have the authority to refuse to issue a Business Tax Registration Certificate (DeBord Declaration ¶ 7, Appendix A, p. 2).

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[1]Attached as Appendix A is the Declaration of Donald J. DeBord, Chief of the Tax and Permit Division of the City Clerk's Office dated January 29, 1986. Attached as Appendix B is his Declaration dated November 22, 1985. These Declarations were not controverted at trial and appear at pages 727-733 and 421-428, respectively, of the Joint Appendix filed with the California Court of Appeal.

For the year 1984 there were a total of 273,125 accounts subject to the ordinance which generated $131,038,243 in revenues (DeBord Declaration ¶ 6, Appendix B, pp. 1-2). For the tax year 1985 there were a total of 250,653 accounts subject to the ordinance, which generated $141,605,793 in revenues for the City (DeBord Declaration ¶ 7, Appendix B, p. 2).

There is within the ordinance, section 21.166[2] which is a generic classification of business activity generally referred to as "wholesale sales." "Every person manufacturing and selling any goods, wares or merchandise at wholesale or selling any goods, wares or merchandise at wholesale" is subject to a tax measured by gross receipts. The tax is $20.00 per year or fractional part thereof for the first $20,000, plus $1.00 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $20,000.00. This tax rate has been in effect since January l, 1971 (DeBord Declaration ¶ 10, Appendix A, pp. 2-3). For the tax year 1984, there were 28,530 accounts within this classification, generating $19,475,181 in revenues (DeBord Declaration ¶ 8d, Appendix B, p. 3). For the tax year 1985 there were 24,931 accounts, generating $17,610,797 in revenues (DeBord Declaration ¶ 8e, Appendix B, p. 3).

Section 21.167 is a generic classification of business activity generally referred to as "retail sales." "Every person manufacturing and selling any goods, wares or merchandise at retail or selling any goods, wares or merchandise at retail" is subject to a tax measured by

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[2]Unless otherwise specified, "section" refers to a section of the Los Angeles Municipal Code. The full text of sections 21.15(h), 21.109, 21.147, 21.166, 21.167, 21.189.2, 21.190 and 21.192, discussed herein, appear in Appendix E, pp. 31a-49a, of the Jurisdictional Statement filed by Appellants and will not be republished in full here.

gross receipts. The tax is $18.75 per year or fractional part thereof for the first $15,000, plus $1.25 per year for each additional gross receipts. This tax rate has been in effect since January 1, 1971, (DeBord Declaration ¶ 11, Appendix A, p. 3). For the tax year 1984 there were 75,975 accounts in this classification which generated $26,205,333 in revenues (DeBord Declaration ¶ 8d, Appendix B, p. 3). For the year 1985 there were 68,268 accounts in this classification, generating $25,394,465 in tax revenues (DeBord Declaration ¶ 8e, Appendix B, p. 3).

The ordinance classifies various other business activities under other generic classifications. For example, section 21.190 classifies all persons who engage in any trade, calling, occupation, profession or other means of livelihood as an independent contractor, *not otherwise specifically taxed* by other provisions of the ordinance. The tax rate is $30.00 per year for the first $6,000 of gross receipts plus $5.00 for each additional $1,000 of gross receipts. This rate has been in effect since January 1, 1971 (DeBord Declaration ¶¶ 8e, 9c & 9d, Appendix B, pp. 3-4). For the tax year 1984 there were 76,191 accounts in this classification, resulting in $63,458,753 in revenues and for the tax year 1985 this classification contained 75,074 accounts, resulting in $69,228,210 in revenues (DeBord Declaration ¶¶ 8d & 8e, Appendix B, p. 3).

Section 21.192 is a classification for the rental of tangible personal property which is any personal property that "may be seen, weighed, measured, felt, or touched, or which is in any manner perceptible to the senses." The measure of tax is the taxpayers gross receipts and the tax is $30.00 for the first $12,000 of gross receipts plus $2.50 for each $1,000 of gross receipts in excess of $12,000 (DeBord Declaration ¶ 18, Appendix A, p. 5).

Theaters, including theaters which exhibit motion pictures, are classified by section 21.147. The measure of tax under this section is based upon gross receipts and the tax is calculated at the same rate and in the same manner as for section 21.167, retail sales (See pp. 3-4, *supra*) (DeBord Declaration ¶ 17, Appendix A, p. 5).

The ordinance, by section 21.109, classifies and taxes motion picture and cartoon production. The measure of this tax is based upon the total of the gross costs of production, gross receipts for the lending of employees and gross receipts received from the furnishing of motion picture studio facilities. The tax is graduated and where the measure of the tax is $4,200,000 or more, the tax does not exceed $10,750 (DeBord Declaration ¶ 16, Appendix A, pp. 4-5).

Prior to January 1, 1984, receipts derived from the publication and sale of newspapers, magazines and other periodicals regularly issued at average intervals not exceeding three (3) months, and radio and television broadcasting, were excluded from taxation pursuant to sections 21.190(c)(7) and 21.190(c)(8). At all times prior to January 1, 1984, businesses engaged in the publishing and printing of books and other non-exempt printed material were subject to taxation and classified under sections 21.166 and 21.167 (DeBord Declaration ¶ 9, Appendix A, p. 2).

Effective January 1, 1984 these exemptions were eliminated and receipts from the publication and sale of newspapers, among others, were classified for City business tax purposes by adding Sections 21.166(f) and 21.167(d) and radio and television broadcasting was classified by adding section 21.189.2. Section 21.109 (Motion Picture and Cartoon Producer) was amended by adding subdivision (d) to prevent double taxation of

television producers by exempting them from section 21.109 if otherwise subject to Section 21.189.2. The tax rate for broadcasters is the same as for retail sales, section 21.167 (See pp. 3-4, *supra*) (DeBord Declaration ¶¶ 11 & 12, Appendix B, p. 4).

The term "goods, wares or merchandise" as used in sections 21.166 and 21.167 was amended to include "newspapers, magazines, periodicals, books and other printed matter". The term "manufacturing" as used in those sections was amended to include "publishing or publishing and printing." All persons in the business of publishing or publishing and printing of newspapers, magazines, periodicals, books and other printed material are treated identically for City tax purposes, not only with each other, but with all other retail and wholesale businesses (DeBord Declaration ¶ 13, Appendix A, pp. 3-4).

The City Clerk is authorized by section § 21.15(h) to adopt rules and regulations to insure a fair apportionment of taxes. The City Clerk has promulgated Tax Ruling Nos. 13 and 14[3] for the apportionment of gross receipts of taxpayers subject to sections 21.166 and 21.167. Each was adopted on June 30, 1972 and each is applicable to all businesses classified as either a wholesaler or retailer, now including those engaged in the business of publishing or publishing and printing, such as Appellants (DeBord Declaration ¶ 19, Appendix A, p. 5). Each provides for an apportionment formula based upon specified physical elements and further provides that any person who believes that the percentages do not apply to the facts of the taxpayer's particular business may peti-

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[3]City Clerk's Tax Rulings 13 and 14 are set forth in full in Appendices C and D respectively.

tion the City Clerk, in writing, for a modification of the formula. The taxpayer has the burden of establishing the modification.

ARGUMENT

1. THE JUDGMENT BELOW WAS CORRECT IN HOLDING THAT THE LOS ANGELES CITY BUSINESS TAX IS CONSTITUTIONAL UNDER THE GUIDELINES ENUNCIATED BY THIS COURT IN MINNEAPOLIS STAR.

Appellants' argument that the Los Angeles City Business Tax is an unconstitutionally discriminatory tax in violation of this Court's holding in *Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue* [(1983) 460 U.S. 575], was properly rejected below for two cogent reasons:

1. It depended upon a factual presentation which cast the structure of the City tax ordinance in a false light; and

2. It required that *Minneapolis Star* be extended to require a unitary tax for all First Amendment business enterprises.

The attempt to place the City tax structure in a false light is clearly shown by reference to the chart at page 7 of the Jurisdictional Statement. At first reading it appears that the ordinance is designed to classify and tax only those businesses which are unquestionably protected by the First Amendment to the exclusion of other businesses. However, even a cursury review of the text of those ordinances as set forth in Appendix H of the Jurisdictional Statement (pp. 33a-50a) and the Declarations of Donald J. DeBord attached hereto as Appendices C and D, shows the misleading nature of the chart. The

record unequivocally proves that the City business tax is a broad based general business tax which applies to all businesses. Business enterprises are classified by generic classifications, not by specific business activities. Thus Appellants, as newspaper publishers, are classified as manufacturers and sellers or sellers at wholesale or retail, classifications which account for over 33% of all tax accounts subject to the City tax (DeBord Declaration 15, Appendix A, p. 4).

The holding in *Minneapolis Star* was limited to a tax which singled out the press for a special or unique tax and then targeted a small group of newspapers to bear the full burden of the tax (at 591-592). This Court, in very specific language, stated that broad based economic regulation, such as the City business tax, does not create constitutional problems (at 581) and rejected the concept put forth by the Appellant in that case that a generally applicable tax on the press is unconstitutional (at 586, n.9).

Recognizing that the constitutional concerns expressed by this Court have been addressed in the manner approved by this Court, Appellants reason that the constitutional infirmity with the City's tax ordinance is not that it does not apply equally to the "press" or "newspapers" (let alone all publishers) but that it does not apply equally to all business activities protected by the First Amendment, that is, *Minneapolis Star* does not mean what it clearly says.

Minneapolis Star held only that the tax had to be one of "general applicability" and not single out the First Amendment activity encompassed by the tax. The opinion contains no language (nor does any subsequent opinion) to support Appellants' radical conclusion that, assuming a general tax, the ordinance must provide the same tax

rate for all First Amendment activities or alternatively, require that it assure tax parity between First Amendment and non-First Amendment businesses. An equally absurd result would obtain if the Appellants are returned to the tax exempt status they enjoyed prior to January 1, 1984. Their reasoning dictates that if one First Amendment business activity is exempt, then all must be. Such reasoning is inconsistent with this Court's long established precedent with respect to the ability of a legislature to create reasonably based tax classifications [See *e.g., Carmichael v. Southern Coal & Coke Co.* (1936) 301 U.S. 495], let alone *Minneapolis Star.*

In order to bolster their argument, Appellants loudly complain that they pay more in taxes than a movie producer given the same gross receipts (Jurisdictional Statement, p. 8). However, the trial record is devoid of any evidence to show that any one producer's cost of production is equal to the gross receipts of Appellants. Appellants assume, without evidence, that there is a producer who is willing (and able) to spend $100 million in production costs in the City of Los Angeles. The Court of Appeal correctly observed that the movie industry is a fragmented one and that the City taxes all the fragments. That, along with the fact that there was no showing that a movie producer operated in a similar manner to newspaper publishers or any other manufacturer, retailer or wholesales, precluded a constitutional violation (Jurisdictional Statement, pp. 17a-18a).

It is also important to emphasize what Appellants *do not* complain about. There is no complaint that they pay more in taxes than others similarly classified as manufacturers and sellers or sellers with the same gross receipts. Clearly, if the City tax structure treated similarly situated taxpayers differently, and that difference was based

upon the exercise of protected First Amendment activities, there would be much to be concerned about. Appellants' problem is that all similarly situated businesses are treated identically for tax purposes without reference to the First Amendment, resulting in no substantial federal question before this Court.

The evidence before this Court is uncontroverted. There is no discrimination; there is no special or unique tax. There is neither content review, nor a censorial threat repugnant to the First Amendment. Appellants want this Court to promote their self-created artificial distinctions and radical legal theory to the equivalent of a constitutional violation. It is clear that their reliance on *Minneapolis Star* is misplaced based upon the plain language of that opinion. Since this Court declined to consider whether a distinction between different types of periodicals (by exempting newspapers and not magazines from the state sales tax) presented a basis for invalidating a tax as it was applied to the press in *Arkansas Writers' Project, Inc. v. Ragland* [No. 85-1370 (Apr. 22, 1987) 95 L.Ed. 2d 209, 215], Appellants have no legal support for their extreme position that *Minneapolis Star* requires *all* First Amendment businesses be treated the same.

2. REVIEW IS NOT NECESSARY TO SECURE UNIFORMITY OF DECISION.

Contrary to the impression given this Court by the Appellants in their Jurisdictional Statement (pp. 16-20), the opinion of the Court of Appeal is not in conflict with any decision of this Court or any other Court.

Unlike the facts in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* [(1983) 460 U.S. 575], the Los Angeles City business tax does not "impose a special tax on the press and, by enacting exemptions, to

limit its effect to only a few newspapers" (at 576). The uncontroverted facts show that this tax is a general business tax applicable to all businesses, including manufacturers and sellers at wholesale and retail. The publishers of "newspapers, magazines, periodicals, books and other printed matter" are all subject to the tax without exception or exemption and treated similarly to all non-publisher manufacturing and mercantile businesses.

Unlike the facts in *Arkansas Writers' Project, Inc. v. Ragland* [No. 85-1370 (Apr. 22, 1987) 95 L.Ed. 2d 209] no tax status is based upon content (at 223). Further, with respect to the reserved issue therein, whether a distinction between different types of periodicals would invalidate a tax, the City's business tax treats all publishers of newspapers, magazines, periodicals, and other printed material the same. Thus even should this Court in the future require such identical treatment, the City's business tax will still pass "constitutional muster".

Unlike the facts in *Louisiana Life, Ltd. v. McNamara* [504 So. 2d 900 (La.App. 1 Cir., 1987)], the Los Angeles City business tax does not "exempt some publications but not all publications" (at 902) and therefore, it is not unconstitutional because it applies only to the manufacture and sale of magazines and not newspapers (at 905). The "equality of status" required by the Louisiana Court (at 905) is realized in the City's ordinance when, in removing the exemption from taxation for newspapers, magazines and other periodicals, it subjected all newspapers, magazines and periodicals to the same tax classification and same tax rate long imposed on the publishers of books and other printed material. Indeed, the "equality of status" requirement imposed by the Louisiana Court would be fruitful grounds to argue that the previous exemption for "newspapers, magazines and other periodi-

cals regularly published at average intervals not exceeding three months" was unconstitutional because there is no qualitative difference under the First Amendment for words printed at intervals of less than 3 months and books or semi-annual or annual periodicals.

Unlike the facts in *Thomson Newspapers, Inc. v. City of Florence* [338 S.E. 2d 324 (S.C. 1985)] newspapers are not separately classified but are classified as a manufacturer for business license tax purposes as the complaining newspaper asserted was constitutionally required (at 325).

Unlike the facts in the case *In Re Advisory Opinion To The Governor* [509 So. 2d 292 (Fla. 1987)], the Los Angeles City business tax does not grant a tax exemption to a few types of motion picture productions (at 309). In fact the City imposes a business tax on all movie production in the City.

Unlike the facts in *City of Alameda v. Premier Communications Network, Inc.* [156 Cal.App.3d 148, 202 Cal.Rptr. 684, cert. denied, 469 U.S. 1073 (1984)], these taxpayers are not being "taxed differently than the great majority of business and in a more burdensome manner" than other businesses (at 155-156). The converse is true here. These plaintiffs are taxed identically with the great majority of businesses and in the same manner.

Unlike the facts in *Festival Enterprises, Inc. v. Pleasant Hill* [(1986) 182 Cal.App.3d 960, 227 Cal.Rptr. 601], these taxpayers are not the only ones expected to bear the entire impact of the tax (at 964). They are treated identically with all other "publishers" as well as every other manufacturer or seller. The tax imposed on these petitioners is not "in addition to" the basic business

license tax (at 964), it is the basic business license tax from which these taxpayers were previously exempt.

Thus, even assuming for the sake of argument, that there is conflict between these cases as Appellants insist, there is no conflict between them and the opinion of the Court of Appeal. As to the specific constitutional concerns raised in each case, Appellee's tax is imposed in a constitutionally approved manner. Whatever conflicts or inconsistencies may exist between various Courts, there are no issues presented here which would allow this Court to resolve them.

It is equally important to point out that the Court of Appeal opinion is not only not inconsistent with the above cited cases, but also that it is entirely consistent in reasoning and result with established precedent with respect to general taxation of newspapers. See *Girage v. Moore* (1937) 64 P.2d 819, appeal dismissed for want of a substantial federal question, 301 U.S. 670 (1937); *Arizona Publishing Co. v. O'Neil* (1938) 22 F. Supp. 117, judgment affirmed, 304 U.S. 543 (1938); *Tampa Times Co. v. City of Tampa* (1947) 29 So. 2d 368, appeal dismissed for want of a substantial federal question, 332 U.S. 749 (1947).

3. THE COURT OF APPEAL WAS CORRECT IN REJECTING APPELLANTS' CONTENTION THAT THE CITY BUSINESS TAX IS UNCONSTITUTIONAL BECAUSE IT GRANTS THE CITY CLERK "STANDARDLESS DISCRETION" TO ADOPT RULES TO APPORTION TAXES.

The term "standardless discretion" has no meaning with respect to the concept of apportionment of taxes. As the Jurisdictional Statement correctly notes (pp. 2-3), standardless discretion is a concept used in the context of a state's regulatory authority (*i.e.*, the issuance of a

discretionary permit), not its taxing power. Appellants are unable to cite to this Court a case from any court which uses that term or concept with respect to apportionment.

Essentially, their argument requires this Court to overrule long established precedent. This is best illustrated by reference to *Butler Brothers v. McColgan* [(1941) 315 U.S. 501] which held that the concept of apportionment is a "method of allocation which is fairly calculated to assign . . . that portion of the net income 'reasonably attributable' to the business done there" (at 506). This Court placed the burden on the party attacking the apportionment formula to show by clear and cogent evidence that the formula resulted in extraterritorial values being taxed (at 507). Indeed, Justice Douglas commented that this should come as no surprise because it was "settled doctrine" (at 510).

As the Court of Appeal correctly reasoned (Jurisdictional Statement, p. 23a), the rule requested by Appellants would result in a shift of the burden of proof from the taxpayer to prove unfair taxes to the City Clerk to justify the formula under the compelling state interest test. Appellants' sole authority for this shift is *Big Mama Rag v. United States,* 631 F.2d 1030 (D.C. Cir. 1980), which is simply not even close to being on point as Appellants assert (Jurisdictional Statement, p. 19). The Court below correctly limited the holding of *Big Mama Rag* (Jurisdictional Statement, pp. 23a-24a) to the denial of a tax exemption based solely upon the content of protected speech. Indeed, *Big Mama Rag* does not even apply where the criteria used to deny a tax exemption is content neutral. See *National Alliance v. United States,* 710 F.2d 868 (D.C. Cir, 1983).

With this in mind, two obvious but important facts about City Clerk's Tax Rulings 13 and 14 (Appendices C and D) must be emphasized:

1. They are content neutral, hence *Big Mama Rag* does not apply if one assumes they are tax exemptions.

2. They were not promulgated to grant an exemption from taxation but to determine the fair amount of taxes reasonably attributable to in-city business activity. Since their purpose is not to subsidize a constitutional right, let alone subsidize one First Amendment activity at the expense of another, strict scrutiny does not apply. See *Regan v. Taxation with Representation* (1983) 461 U.S. 540.

There is no conflict or inconsistency between the Court of Appeal decision, the tax rulings and any federal court decision with respect to apportionment. The reasoning and holding of the Court below is consistent with established precedent, and since there is no authority to the contrary, there is no issue for this Court to review and the appeal should be dismissed or the judgment affirmed.

CONCLUSION

There are no substantial constitutional questions presented in this matter. The Court of Appeal opinion is neither contrary to established precedent nor in conflict with authority from any jurisdiction and the appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

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APPENDIX A

DECLARATION OF DONALD J. DeBORD

I, DONALD J. DeBORD declare as follows:

1. I have been employed in the Tax and Permit Division, Office of the City Clerk of the City of Los Angeles for the past 24 years. I am the Chief of said Division.

2. I am required to know, and do in fact know the provisions of Chapter II of the Los Angeles Municipal Code, and the rules and regulations adopted pursuant thereto by the City Clerk of the City of Los Angeles.

3. My responsibilities includes the supervision and control over the employees of and the record-keeping procedures used by the Tax and Permit Division. I am required to know and in fact do know the duties of the employees I supervise and the methods used in maintaining the records which I supervise.

4. Chapter II of the Los Angeles Municipal Code (hereinafter L.A.M.C.), generally governs licenses, permits and taxes within the City of Los Angeles (hereinafter 'City'). Article 1 of Chapter II of the L.A.M.C. specifically establishes the Business Tax Ordinance.

5. The Business Tax Ordinance is a tax imposed upon persons for the privilege of engaging in businesses or occupations within the City [attached hereto as Exhibit A is a true, full and correct copy of L.A.M.C.: § 21.00(b)]. It is a self reporting tax [Attached hereto as Exhibit B is a true, full and correct copy of L.A.M.C. § 21.14(a)1], and imposed pursuant to the taxing power of the City solely for the purpose of raising revenue [attached hereto as Exhibit C is a true, full and correct copy of L.A.M.C. § 21.03(b)].

6. Every person engaged in specified businesses or occupations within the City must obtain a Business Tax Registration Certificate (hereinafter BTRC) [attached hereto as Exhibit D is a true, full and correct copy of L.A.M.C. § 21.03(a)] which is the means whereby and taxpayer registers with the City Clerk for the purposes of paying business taxes. [Attached hereto as Exhibit E is a true, full and correct copy of L.A.M.C. § 21.08]. As a result of obtaining a BTRC, an account number is given the taxpayer.

7. The Office of the City Clerk of the City of Los Angeles does not have the authority to refuse to issue a BTRC.

8. The Times-Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises each hold valid BTRC's.

9. Prior to January 1, 1984, receipts derived from the publication and sale of newspapers, magazines and other periodicals regularly issued at average intervals not exceeding three (3) months, and radio and television broadcasting were excluded from taxation pursuant to Sections 21.190(c)(7) and 21.190(c)(8) (Attached hereto as Exhibit F is a true, full and correct copy of L.A.M.C. § 21.190 as it existed on December 31, 1983). At all times prior to January 1, 1984, businesses engaged in publishing and printing of books and other non-exempt printed material were subject to the City Business Tax Ordinance, classified under L.A.M.C. Sections 21.166 and 21.167.

10. L.A.M.C. Section 21.166 is a general classification of business activity generally referred to as "wholesale sales". "Every person manufacturing and selling any goods, wares or merchandise at wholesale or selling any

goods, wares or merchandise at wholesale" is subject to a tax measured by gross receipts. The tax is $20.00 per year or fractional part thereof for the first $20,000 or less of gross receipts, plus $1.00 per year for each additional $1000.00 of gross receipts or fractional part thereof in excess of $20,000.00. This tax rate has been in effect since January 1, 1971.

11. L.A.M.C. Section 21.167 is a general classification of business activity generally referred to as "retail sales". "Every person manufacturing and selling any goods, wares or merchandise at retail or selling any goods, wares or merchandise at retail" is subject to a tax measured by gross receipts. The tax is $18.75 per year or fractional part thereof for the first $15,000 or less of gross receipts, plus $1.25 per year for each additional $1000.00 of gross receipts or fractional part thereof in excess of $15,000.00. This tax rate has been in effect since January 1, 1971.

12. Effective January 1, 1984 the exemptions noted in paragraph 9 were eliminated and publishing businesses were classified as the manufacturing and selling or selling of any goods, wares or merchandise at either wholesale or retail, and taxed by the addition of subsections (f) and (e) to Sections 21.166 and 21.167, respectively, [Attached hereto as Exhibits G and H, respectively, are true, full and correct copies of Sections 21.166 and 21.167 as they existed on January 1, 1984]. Radio and television broadcasting was classified by the addition of Section 21.189.2 to the L.A.M.C. (attached hereto as Exhibit I is a true full and correct copy of Section 21.189.2) but taxed at the same rate as provided in Section 21.167, retail sales, as described in paragraph 11, above.

13. For purposes of the Business Tax Ordinance, "newspapers, magazines, periodicals, books and other printed matter" are included within the term "goods,

wares or merchandise" as used in Sections 21.166 and 21.167; and "publishing or publishing and printing" are included within the term "manufacturing" as used in Sections 21.166 and 21.167. All persons in the business of publishing or publishing and printing of newspapers, magazines, periodicals, books and other printed material are treated identically for City tax purposes, not only with each other, but with all other retail and wholesale businesses.

14. In addition to gross receipts from the manufacturing or sale of goods, wares or merchandise, gross receipts from advertising revenues which would otherwise be subject to the tax rate of L.A.M.C. § 21.190 were included within the definition of "gross receipts" in Sections 21.166(f) and 21.167(e), thus minimizing the tax burden on those engaged in the business of publishing or publishing and printing. Otherwise, publishing enterprises are given identical treatment with all other businesses classified by Sections 21.166 and 21.167.

15. Sections 21.166 and 21.167 are general or generic business classifications for all wholesale and retail businesses. For the tax year 1984 these classifications represented 38% of the accounts under the Business Tax Ordinance (104,505 of 273,125 accounts). For the tax year 1985 these classifications represented 35% of the accounts subject to the Business Tax Ordinance (93,199 of 250,653 accounts).

16. The Business Tax Ordinance classifies various business activities and imposes a business tax measured by gross receipts under some circumstances and alternate measures under other circumstances. One such classification is "Motion Picture Producer" which is classified by L.A.M.C. § 21.109 (attached hereto as Exhibit J, is a true, full and correct copy of Section 21.109). The measure of

this tax is based upon the total of the gross costs of production, gross receipts for the lending of employees and the gross receipts received from furnishing of motion picture studio facilities. The tax is graduated and where the measure of the tax is $4,200,000 or more, the tax does not exceed $10,750.00.

17. Theaters, including theaters which exhibit motion pictures, are classified by L.A.M.C. Section 21.147 (attached hereto as Exhibit K is a true, full and correct copy of § 21.147). The measure of tax under this section is based upon gross receipts and the tax is calculated at the same rate as in § 21.167, retail sales, as described in paragraph 11 above.

18. The rental of movies is placed in the general or generic business classification of one engaged in the rental of tangible personal property pursuant to L.A.M.C. Section 21.192 (attached hereto as Exhibit L is a true, full and correct copy of L.A.M.C. § 21.192). The measure of tax is based upon gross receipts and the tax is $30.00 for the first $12,000 of gross receipts plus $2.50 for every $1000 in excess of $12,000.

19. The City Clerk is authorized by L.A.M.C. § 21.15(h) [Attached hereto as Exhibit M is a true, full and correct copy of L.A.M.C. § 21.15(h)] to make rules and regulations to insure a fair apportionment of taxes. The City Clerk has promulgated two tax rulings with regard to L.A.M.C. Sections 21.166 and 21.167, for the apportionment of California gross receipts. City Clerk's Rulings 13 and 14, (Attached hereto as Exhibits N and O respectively, are true, full and correct copies of Rulings 13 and 14). Each was adopted on June 30, 1972 and applicable to all businesses classified as either a wholesaler or retailer, now including those engaged in the business of publishing or publishing and printing.

20. In addition to 21.15(h) (Exhibit M) and Clerk Rulings 13 and 14 (Exhibits N and O, respectively), by the terms of L.A.M.C. §§ 21.166(f) and 21.167(e) (Exhibits G and H, respectively), gross receipts of plaintiffs are limited only to California gross receipts. Further, goods shipped out of state to the purchaser are excluded from gross receipts pursuant to LA.M.C. 21.168.1. (Attached hereto as Exhibit P is a true, full and correct copy of L.A.M.C. § 21.168.1).

21. The Times-Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises computed, reported and paid their 1984 and 1985 City Business Taxes as required by LA.M.C. 21.14(a) 1 (Exhibit B), each under protest.

22. All the facts set forth in this Declaration are within my personal knowledge or contained in the official records of the City Clerk of the City of Los Angeles, and, if sworn as a witness, I would testify competently thereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: January 29, 1986

Donald J. DeBord
Declarant

APPENDIX B

DECLARATION OF DONALD J. DeBORD

I, DONALD J. DeBORD declare as follows:

1. I have been employed in the Tax and Permit Division Office of the City Clerk of the City of Los Angeles for the past 24 years. I am the Chief of said Division.

2. I am required to know, and do in fact know the provisions of Chapter II of the Los Angeles, Municipal Code, and the rules and regulations adopted pursuant to thereto by the City Clerk of the City of Los Angeles.

3. My responsibilities includes the supervision and control over the employees of and the record-keeping procedures used by the Tax and Permit Division. I am required to know and in fact do know the duties of the employees I supervise and the methods used in maintaining the records which I supervise.

4. Chapter II of the Los Angeles Municipal Code (hereinafter L.A.M.C.), regulates licenses, permits and taxes generally within the City of Los Angeles (hereinafter 'City'). Article 1 of Chapter II of the L.A.M.C. establishes the Business Tax Ordinance.

5. The Business Tax Ordinance is a tax imposed upon persons for the privilege of engaging in business or occupations within the City [attached hereto as Exhibit A is a true, full and correct copy of L.A.M.C. § 21.00(b)]. It is a self reporting tax imposed pursuant to the taxing power of the City solely for the purpose of raising revenue [Attached hereto as Exhibit B is a true, full and correct copy of L.A.M.C. § 21.03(a) and (b)].

6. For the tax year 1984, a total of 273,125 items were processed subject to the Business Tax Ordinance dispursed among various classifications, which resulted in a

total of $131,038,243 in business tax revenues to the City.

7. For the tax year 1985, a total of 250,653 items were processed subject to the Business Tax Ordinance dispursed among various classifications, which resulted in a total of $141,605,793 in business tax revenues to the City.

8. Three classifications account for over 60% of the items processed and the years 1984 and 1985, and 80% of the business tax revenues.

They are:

(a) The manufacturing and selling of any goods, wares or merchandise at wholesale, or the selling of any goods, wares or merchandise at wholesale pursuant to L.A.M.C. § 21.166 (attached hereto as Exhibit C is a true, full and correct copy of L.A.M.C. § 21.166).

(b) The manufacturing and selling of any goods, wares or merchandise at retail, or the selling of any goods, wares, or merchandise at retail purusant to L.A.M.C § 21.167 (Attached hereto as Exhibit D is a true, full and correct copy of L.A.M.C. § 21.167).

(c) Engaging in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor not otherwise specifically taxed by other provisions of Article 1 of Chapter II of the L.A.M.C. pursuant to L.A.M.C. § 21.190 (Attached hereto as Exhibit E is a true, full and correct copy of L.A.M.C. § 21.190).

(d) For the tax year 1984, these sections produced the following totals:

Section	No. of Items Processed	Tax Revenues
21.166	28,530	$ 19,475,181
21.167	75,975	26,205,333
21.190	76,191	63,458,753
Total	180,696	$109,139,267

(e) For the Tax year 1985 these sections produced the following totals:

Section	No. of Items Processed	Tax Revenues
21.166	24,931	$ 17,610,797
21.167	68,268	25,394,465
21.190	75,074	69,228,210
Total	168,273	$112,233,472

9. The tax rates for L.A.M.C. §§ 21.166, 21.167, and 21.190 are as follows:

(a) L.A.M.C. § 21.166 — $20.00 per year or fractional part thereof on the first $20,000.00 or less of gross receipts, plus $1.00 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $20,000.00. (Exhibit C).

(b) L.A.M.C. § 21.167 — $18.75 per year or fractional part thereof the first $20,000 or for the first $15,000.00 or less of gross receipts, plus $1.25 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $15,000.00. (Exhibit D)

(c) L.A.M.C. § 21.190 — $30.00 per year or fractional part thereof for the first $6,000.00 or less of gross receipts, plus $5.00 per year for each additional

$1,000.00 of gross receipts or fractional part thereof in excess of $6,000.00. (Exhibit E)

(d) Although the current rates became effective January 1, 1971, these sections were contained within the Business Tax Ordinance for the last 24 years to my personal knowledge.

(e) The rates for §§ 21.166 and 21.167 are the lowest rates per $1,000 of gross receipts in Article 1, Chapter II of the L.A.M.C. The rate for § 21.190 is the highest rate per $1,000 of gross receipts.

10. Prior to January 1, 1984, receipts derived from the publication and sale of newspapers and radio and television broadcasting were exempt from taxation pursuant to Sections 21.190(c)(7) and 21.190(c)(8) (Attached hereto as Exhibit F is a true, full and correct copy of L.A.M.C. § 21.190 as it existed on December 31, 1983). Without this exemption, unless specifically taxed by another section, these businesses would have been subject to taxation pursuant to L.A.M.C. § 21.190 (Exhibit F).

11. Effective January 1, 1984 these exclusions were eliminated by Ordinance 158,484 (Attached hereto as Exhibit G is a true, full and correct copy of Ordinance 158,484) and receipts from the publication and sale of newspapers, among others, became subject to City business taxes pursuant to L.A.M.C. Sections 21.166(f) and 21.167(e) (Exhibits C and D, respectively) and radio and television broadcasting became subject to taxation pursuant to L.A.M.C. Section 21.189.2). (Attached hereto as Exhibit H is a true, full and correct copy of L.A.M.C. § 21.189.2). Ordinance 158,484 also amended Section 21.109 (Motion Picture Producer) to add subdivision (d) to prevent double taxation of television producers by exempting them from Section 21.109 if otherwise subject to

Section 21.189.2 [attached hereto as Exhibit I is a true, full and correct copy of L.A.M.C. § 21.109(d)].

12. The tax rate for L.A.M.C. § 21.189.2 (broadcasters) (Exhibit H) is the same as the rate for § 21.167 (retail sales) (Exhibit D).

13. The classification for broadcasting (L.A.M.C. § 21.189.2) (Exhibit H) provided total tax revenues of $187,904 for the tax year 1984 and $197,954 for the tax year 1985 (27 and 35 taxpayers respectively).

14. In addition to gross receipts from the manufacturing and sale or sale of goods, wares or merchandise, gross receipts from advertising revenues which would otherwise be subject to L.A.M.C. § 21.190 (Exhibit E) were included within the definition of "gross receipts" in Sections 21.166 and 21.167 (Exhibits C and D respectively), thus minimizing taxes for newpaper publishers.

15. The City Clerk is authorized by L.A.M.C. § 21.15(h), [Attached hereto as Exhibit J is a true, full and correct copy of L.A.M.C. § 21.15(h)] to make rules and regulations to insure a fair apportionment of taxes. The City Clerk has in fact promulgated two tax rulings with regard to L.A.M.C. Section 21.166 and 21.167, City Clerk's Ruling 13 and 14, (Attached hereto as Exhibits K and L respectively, are true, full and correct copies of Rulings 13 and 14). Each was adopted on June 30, 1972 and each is applicable to these plaintiffs.

16. In addition to 21.15(h) (Exhibit J) and Clerk Rulings 13 and 14 (Exhibits K and L respectively), by the terms of L.A.M.C. §§ 21.166(f) and 21.167(e) (Exhibits C and D, respectively), gross receipts of plaintiffs are limited only to California gross receipts, which includes their advertising revenues in addition to sales revenues. Otherwise, only out of state shipments of sales of goods

would be excluded from gross receipts pursuant to L.A.M.C. § 21.168.1. (Attached hereto as Exhibit M is a true, full and correct copy of L.A.M.C. § 21.168.1)

17. For purposes of tax rulings to apportion taxes for taxpayers subject to L.A.M.C. §§ 21.166 and 21.167 (Exhibits C and D, respectively), L.A.M.C. § 21.190(d) (Exhibit E) has no applicability because by its own terms it excludes taxpayers taxed by other provisions of this code.

18. All the facts set forth in this Declaration are within my personal knowledge or contained in the official records of the City Clerk of the City of Los Angeles, and, if sworn as a witness, I would testify competently thereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: November 22, 1985.

DONALD J. DEBORD
Declarant

APPENDIX C

CITY OF LOS ANGELES
OFFICE OF CITY CLERK
TAX AND PERMIT DIVISION

CITY CLERK'S RULING NO. 13 (NEW SERIES): PERSONS SELLING GOODS, WARES AND MERCHANDISE IN LOS ANGELES, WITH NO FIXED PLACE OF BUSINESS IN LOS ANGELES

Reference: Section 21.00(i) Los Angeles Municipal Code "Engaged in Business" Sections 21.166, 21.167 Los Angeles Municipal Code.

In administering and collecting the business tax imposed under the provisions of Sections 21.166 and 21.167 Los Angeles Municipal Code, the City Clerk shall apply the following rule with respect to those persons who do not have a fixed place of business within the City of Los Angeles.

A person who does not own, lease, occupy or otherwise maintain within the City of Los Angeles a place or premises upon which or from which he engaged in business, shall nevertheless be deemed to be engaged in business within the City of Los Angeles when, through the physical presence of himself, his employees, his agents, or his equipment, he carries on activities within the City of Los Angeles which are designed to solicit, promote, stimulate, or otherwise encourage the sale of goods, ware, or merchandise.

The measure of tax for such person shall be:

(a) 35% of those gross receipts from all sales to customers located within the City of Los Angeles, where delivery or shipment is made to points within the City by vehicles operated by the taxpayer.

(b) 30% of those gross receipts from all sales to customers located within the City of Los Angeles where delivery or shipment is made to points within the City by means other than vehicles operated by the taxpayer regardless of the f.o.b. point or other conditions of sale.

(c) 30% of those gross receipts from all sales to customers located within the City of Los Angeles where delivery or shipment is made to points outside the City.

Any person who believes that the percentage specified in the appropriate foregoing paragraph (a), (b) or (c) is greater than the facts justify, may apply to the City Clerk for a modification of the percentage. Such application shall be made in writing to the City Clerk and shall be accompanied by a statement of facts supporting the basis for such modification. The City Clerk shall make his determination on the basis of evidence presented to him, and such other evidence as he may have, may request from the taxpayer, or may discover from other sources. The City Clerk shall increase, reduce, or allow to stand the percentage originally determined, depending on the facts.

Should the City Clerk be of the opinion that the percentage specified in the appropriate foregoing paragraph (a), (b) or (c) is less than the facts justify in any particular case, he shall make such investigation as is necessary to ascertain the facts and revise the percentage, if required.

Any variation from the percentage provided for under this ruling shall be approved in writing by either the Chief or Assistant Chief of the Tax and Permit Division.

I, Rex E. Layton, City Clerk of the City of Los Angeles, pursuant to authority granted me in Section 21.15(h) of the Los Angeles Municipal Code, do hereby adopt and promulgate the foregoing rule and regulation pertaining

to the collection of the Los Angeles Business Tax and the enforcement of the provisions of Article 1, Chapter 2 of the Los Angeles Municipal Code. I further declare that this ruling supercedes and replaced City Clerk's Ruling No. 13 (New Series) as restated and adopted on April 5, 1960.

/s/ REX E. LAYTON
REX E. LAYTON, CITY CLERK

APPROVED:
ROGER ARNEBERGH, CITY ATTORNEY
By /s/ Thomas C. Bonaventura
Date June 30, 1972

APPENDIX D

CITY OF LOS ANGELES
OFFICE OF CITY CLERK
TAX AND PERMIT DIVISION

CITY CLERK'S RULING NO. 14 (NEW SERIES): PERSONS SELLING GOODS, WARES AND MERCHANDISE, WHO HAVE A FIXED PLACE OF BUSINESS IN LOS ANGELES

Reference: Sections 21.166, 21.167 Los Angeles Municipal Code.

A person engaged in a business within the City of Los Angeles, subject to tax under the provision of Section 21.166 and/or 21.167, Los Angeles Municipal Code, who owns, leases, occupies or otherwise maintains within the City a place or premises upon which or from which he engages in such business, shall be subject to tax as provided herein.

MANUFACTURING IN LOS ANGELES

A person who manufactures any goods, wares, or merchandise within the City of Los Angeles shall be deemed to be engaged in business within the meaning of Section 21.166 and/or 21.167, Los Angeles Municipal Code, and the measure of tax shall include the total gross receipts from the sale of goods manufactured in the City. (Manufacturing, as used herein, shall be deemed to include the assembling or processing of the person's own goods.)

If, with respect to the item produced, substantial manufacturing activities occur outside the City, and the person believes that the total selling price of goods manufactured, in part, within the City does not fairly reflect the amount of the manufacturing activity occurring within the City, the taxpayer may make written application to the

City Clerk for approval to use, as the measure of tax, the total cost of the manufacturing activity carried on within the City, or any other appropriate method.

SELLING ACTIVITIES CARRIED ON WITHIN AND WITHOUT THE CITY OF LOS ANGELES

A person who owns, leases, occupies or otherwise maintains within the City a place or premises upon which, or from which he engages in the business of selling goods, wares, and merchandise, not manufactured by the taxpayer in the City and whose gross receipts from such sales are attributable to business activities carried on within the City and activities carried on outside the City, may apportion such gross receipts and include in the measure of tax those gross receipts directly attributable to activities carried on within the City.

In making a calculation of gross receipts to be reported as the measure of tax, the person may deduct from 100% of gross receipts the percentage of gross receipts deemed to be directly attributable to selling activities carried on by such person outside the City of Los Angeles. For the purposes of this calculation, the person may deduct, to the extent appropriate, but in no case in an amount greater than, the following percentages of those sales, or particular categories of sales, on which the corresponding elements of the selling process are performed at a place or location outside the City:

1. Up to 30% for the location where the sale is negotiated or solicited by the taxpayer, through the physical presence of himself, his employees or his agents.

2. Up to 20% for the sales office which serves as the base of operations for sales activities, or if there is no sales office which serves as a base of operations, the

office from which the sales activities are directed or controlled.

3. Up to 10% for the location where orders or contracts are accepted or approved. Such acceptance or approval shall be deemed to take place at the location of the office specified in item 2 above, unless there is clear and conclusive evidence that a binding acceptance or approval occurs elsewhere.

4. Up to 20% for any facility, operated by the taxpayer, where the goods, wares or merchandise are stored immediately prior to shipment or delivery.

5. Up to 5% for the location which gives the order for, or arranges for, the shipment or delivery of articles sold.

6. Up to 5% for the place where billing procedures are performed.

7. Up to 5% for the place where the collecting of receipts is performed.

8. Up to 5% for the place to which merchandise is delivered, by vehicles operated by the taxpayer.

PROVISION FOR MODIFICATION OF APPORTIONMENT FORMULA

Any person who believes that the percentage determined to be allowable as a deduction from gross receipts under the foregoing provisions of this ruling is less than the facts justify, may apply to the City Clerk for a modification of the percentage. Such application shall be made in writing to the City Clerk and shall be accompanied by a statement of facts supporting the basis for such modification. The City Clerk shall make his determination on the basis of evidence presented to him, and such other

evidence as he may have, may request from the taxpayer, or may discover from other sources. The City Clerk shall increase, reduce or allow to stand the percentage originally determined, depending on the facts.

Should the City Clerk be of the opinion that the percentage calculated to be allowable as a deduction from gross receipts under the foregoing provisions of this ruling is greater than the facts justify in any particular case, he shall make such investigation as is necessary to ascertain the facts and revise the percentage, if required.

Any variation from the percentages provided for under this ruling shall be approved in writing by either the Chief or Assistant Chief of the Tax and Permit Division.

I, Rex E. Layton, City Clerk of the City of Los Angeles, pusuant to authority granted me in Section 21.15(h) of the Los Angeles, Municipal Code, do hereby adopt and promulgate the foregoing rule and regulation pertaining to the collection of the Los Angeles Business Tax and the enforcement of the provisions of Article 1, Chapter 2 of the Los Angeles Municipal Code. I further declare that this ruling supercedes and replaces City Clerk's Ruling No. 14 (New Series) as restated and adopted on September 14, 1960.

/s/ Rex E. Layton
REX E. LAYTON, CITY CLERK

APPROVED:
ROGER ARNEBERGH, CITY ATTORNEY
By /s/ Thomas C. Bonaventura
Date June 30, 1972

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 18, 1987, I served the within Motion of Appellee City of Los Angeles to Dismiss or Affirm in re: "The Times Mirror Company v. the City of Los Angeles" in the United States Supreme Court, October Term 1987, No. 87-919;

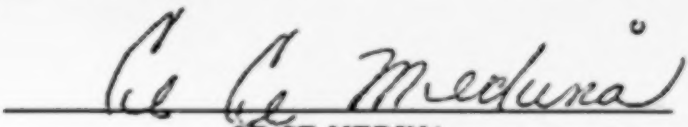
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Rex S. Heinke
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071
Attorneys for appellants.

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 18, 1987, at Los Angeles, California.



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